SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED, *Respondents.*

On Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

BY RELYING ON CONTENTIONS REJECTED IN FORTNIGHTLY AND BY EMPHASIZING A PROSPECTIVE-ONLY RULING, CBS AND THE SUPPORTING AMICI MAKE CLEAR THAT THEY ARE IN FACT SEEKING A REVERSAL OF FORTNIGHTLY.

Respondent CBS [1] and several of the *amici* in coordinated, cross-referenced briefs have launched a frontal assault on this Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968). In its brief the American Society of Com-

[1] Respondents are referred to herein as "CBS" and petitioners as "Teleprompter" for clarity in dealing with the parties in this petition and in No. 72-1633, the Conditional Cross-Petition related to this petition.

posers, Authors and Publishers (ASCAP) straightforwardly argues that *Fortnightly* should be limited to its facts or be overruled prospectively. ASCAP Br. *Amicus* at 22-23. CBS asks this Court to consider acting prospectively only, and states that it is "prepared to waive [its] rights to damages." Br. at 71-72. CBS and the *amici* supporting CBS demonstrate that they are seeking to overturn this Court's *Fortnightly* ruling, by their emphasis on a prospective-only ruling, and by relying on the following arguments made and rejected by this Court in *Fortnightly*.

1. CBS places central reliance (Br. at 34) on one sentence in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 163 (1968), where in a regulatory context this Court referred to "functions" of CATV with reference to "distant signals." CBS, like the court below, omits the footnote in *Southwestern* in which this Court pointed out that "distant signals" had been given a special definition by the FCC (Grade B contour) for regulatory purposes.

The specific language in *Southwestern* upon which CBS now relies was argued by United Artists in its Petition for Rehearing in *Fortnightly*. United Artists then noted that "half of the broadcasting stations whose programs [the *Fortnightly* CATVs] carried were 'distant' stations, whose service areas did not include Clarksburg or Fairmont."[2]

If statements as to differences in CATV "functions" in a decision dealing with the regulatory authority of the FCC indeed had significance in the copyright context, this Court would have noted that significance in *Fortnightly*, but of course it did not.

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[2] Petition for Rehearing filed by United Artists Television, Inc., at 25, Fortnightly Corp. v. United Artists Television, Inc., 393 U.S. 902 (1968) (denying rehearing).

The court below found the FCC's definition of "distant signals" for regulatory purposes to be "unsuitable for copyright purposes" (JA xxxv). And CBS now acknowledges that the FCC "definition certainly does not define 'distance' for copyright purposes in the instant case, just as it did not determine the result in *Fortnightly*" (Br. at 32, n. 32).[3] Whatever the merit and purposes of the FCC's definition of "distant signals" for regulatory purposes, neither that definition nor the discussion of it in *Southwestern* should have application here.[4]

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[3] Despite this concession, CBS suggests (Br. at 69, n. 70) that the new definition of "distant" signals in the 1972 *Cable Television Report and Order*, 36 F.C.C. 2d 143, 173-76, as codified in 47 CFR §§ 76.54, 76.57, 76.59, and 76.61, would achieve virtually the same result as the "specific results" of the formulation by the Court of Appeals. CBS makes no pretence that the definitions are even similar, but argues that the use of the FCC 1972 definition, issued long after the dates of the alleged infringement, would solve the "anomalous decision" by the court below with respect to the Farmington CATV's reception of the Durango station. CBS, however, fails to point out that even under the 1972 FCC regulation four of the stations received by the *Fortnightly* CATVs were "distant signals," and thus such a use of the new FCC definition for copyright purposes would require a partial overruling of *Fortnightly*. CBS' position here, moreover, is in direct contrast to the then view of its counsel, as expressed in the *Fortnightly* litigation in the brief *amicus* filed for Broadcast Music, Inc., that "Grade B contours do not produce 'certainty,' and they have no proper place in the administraton of the copyright law." Brief of *Amicus Curiae* of Broadcast Music, Inc., at 19, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (hereinafter "Brief of BMI as *amicus*").

[4] CBS argues (Br. at 16) that Teleprompter's Elmira CATV "import[ed]" "distant signals" without pointing out that the Court of Appeals made no ruling that the Elmira CATV infringed by receiving "distant signals." No issue with respect to Elmira was presented by this petition and therefore no "distant signal" issue with respect to Elmira is before the Court in this case.

2. CBS repeats the attempt made in *Fortnightly* to confuse a decision by a CATV operator as to the selection of stations to be received and carried by the CATV with the selection and procurement of programs by a broadcaster. For example, CBS argues that stations whose signals were received were "deliberately selected in consideration of the type of programming they offered." Br. at 15; see also *id.* at 12, 41, 42 and 44.[5]

United Artists argued in this Court in *Fortnightly* that when the CATV "selects for relay and distribution the broadcasts of certain television stations rather than those of others, [Fortnightly] is, in a very real sense, selecting programs." Brief of Respondent at 21, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (hereinafter "Respondent's Brief in *Fortnightly*").[6]

This Court rejected the "selection" contention revived here by CBS, holding that "CATV systems sim-

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[5] As part of this "program selection" argument, CBS asserts that Teleprompter "chose to retransmit only particular segments of the Durango station's broadcast schedule so as to fit more neatly into the program format it desired to present to its subscription-paying audience." Br. at 14 n. 13; see also *id.* at 41 n. 40. However, as CBS stipulated, the facts were that the Durango station was received when the Albuquerque educational station (a part-time station) was not broadcasting. JA 188 n.* The similar CBS "program selection" argument with respect to the Great Falls CATV (Br. at 15, 41 n. 40) involved similar facts. JA 221. Thus, CBS attempts to distort carriage of a local station on a channel empty when an educational station was not broadcasting into program selection.

[6] Counsel for CBS (who filed a brief *amicus* in *Fortnightly* on behalf of Broadcast Music, Inc.) argued that the CATV was analogous to a broadcaster because it "pre-selected the stations whose programs were provided to the subscribers." Brief of BMI as *amicus* at 7-8. See also the findings of the District Court in *Fortnightly* on this contention, *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177, 200 n. 10 (S.D.N.Y. 1966).

ply carry, without editing, whatever programs they receive." 392 U.S. at 400.

3. CBS argues that "the copyright owners who licensed programs for broadcast in one particular market, did not intend the programs to be picked up in that market by a Teleprompter cable system and retransmitted to a separate distant market." Br. at 46. Such "importation", CBS asserts, jeopardizes the market for the copyright holder in the second market, particularly the syndication market (license to individual stations as distinguished from a network), and impairs the copyright owner's ability to license his work to a station located in the CATV community. Br. at 44-48.

United Artists made the same argument in this Court in *Fortnightly,* emphasizing the adverse consquences for the copyright owner "because the market value of a film for broadcasting in any area is lessened when the film has already been shown by broadcast or CATV in the area." Respondent's Brief in *Fortnightly* at 63; see also *id.*, at 40-45.[7]

As this Court recognized, there were two "local" stations involved in the *Fortnightly* case. *See* 392 U.S. at 392 n. 4. United Artists argued that the *Fortnightly* CATVs' "importation" of its copyrighted motion pictures broadcast by the Pittsburgh stations into the Clarksburg "market" (where the CATVs were located) lessened the value of these films for licensing to the Clarksburg station. Respondent's Brief in *Fort-*

[7] Counsel for CBS, in their brief *amicus* filed in *Fortnightly* on behalf of Broadcast Music, Inc. argued the right of a copyright proprietor "to limit licenses to perform his work in public to defined periods and areas or audiences . . ." (Brief of BMI as *amicus* p. 12), and the adverse consequences CATV reception caused copyright owners in licensing their works (*id.* at 13-15).

nightly, at 62-63. Other than the fact that the distance from Pittsburgh to Clarksburg was approximately 80 miles (as compared to longer distances from, *e.g.*, Denver to Rawlins), the copyright "market" argument was identical to that offered by the copyright proprietor here.

These arguments—turning the definition of "performance" in the Copyright Act on the market economics the copyright owner would prefer—should be rejected here, just as they were rejected in *Fortnightly*.

4. CBS argues (Br. at 60) that CATV reception is "unfair competition" to local broadcasters, quoting from the 1968 *Notice of Proposed Rule Making and Notice of Inquiry*, 15 F.C.C.2d 417 (1968) (hereinafter *"1968 Notice"*), where the Commission discussed proposed non-duplication rules protecting local stations under the public interest standards of the Communications Act.

The same contentions of "unfair competition" with stations were urged by United Artists in *Fortnightly* (Respondent's Brief in *Fortnightly* at 55-59), citing, as CBS does (Br. at 59), from the *Second Report and Order on Community Antenna Television Systems*, 2 F.C.C.2d 725 (1966). The Commission's concern discussed in these reports was a regulatory one under the Communications Act. Indeed, in the *1968 Notice*, the Commission explicitly stated that it was not concerned "with unfair competition from the aspect of the copyright owner." *1968 Notice, supra*, ¶¶ 36, 37, at 431.

5. CBS discusses (Br. at 20-26) a series of early copyright cases (briefed extensively in *Fortnightly*)

which CBS contends establish under "pre-*Fortnightly* law" (Br. at 24) that every means of "communicating the contents of a copyrighted work to the public" was held to be a "public performance." It concludes that, under this "pre-*Fortnightly* law", the "retransmission" of broadcasts from the communities where they were broadcast to "distant communities" was "deemed" to be a performance. *Id.*

Precisely the same argument was made in *Fortnightly*. United Artists argued that the performance lies in "communicating the pictures and sounds which comprise it [the copyrighted work] in whatever form they may be." Respondent's Brief in *Fortnightly* at 16. Like CBS, United Artists urged that "amplifying, processing and retransmitting the electromagnetic radiation of television broadcasts" is the performance. (*Id.* at 16).

In *Fortnightly* this Court rejected the "transmission" and "retransmission" arguments, and CBS' interpretation of the "pre-*Fortnightly*" copyright cases. Transmission is the process of transferring an electrical signal from one location to another. And in its reference to the early copyright cases (392 U.S. at 398 nn. 23, 24) this Court made clear that performance is separate from transmission.[8] Transmission has significance in this copyright context only when the person transmitting, *e.g.*, the broadcaster, performs and thereafter by transmission makes the performance public. As a result, the Court limited *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), cited by CBS (Br. at 23, n. 25), to its own facts, which involved an

[8] The Court is referred to the Brief of Petitioner at 43-58, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), for a detailed discussion of these decisions.

audible rendition of a song by the hotel's radio equipment, and *not* mere "transmission" of signals (392 U.S. at 397, n. 18).[9]

Despite the all-encompassing "transmission" argument, CBS suggests, for the first time in this litigation, that some often-cited early broadcast copyright cases "may have anticipated" a "functional distinction between 'local' and 'distant' signals in the copyright area" (Br. at 34). The cases cited do not support such a theory. In *Buck* v. *Debaum*, 40 F.2d 734 (S.D. Cal. 1929), the court said that the copyright owner had sanctioned, by licensing the broadcast, "any 'pick up' out of the air that was possible in radio reception" (*id.* at 735). And in *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926), the court merely held that a radio station which broadcast an unauthorized performance rendered in a hotel ballroom was liable as a contributory infringer. When this Court stated in *Fortnightly* that "[v]iewers do not perform" (392 U.S. at 398), it suggested no analogies to "open windows" (but cf. CBS Br. at 36) and made no distinctions as to distance in the reception of broadcast signals.

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[9] CBS refers (Br. at 42) to one recent copyright case, *Walt Disney Productions* v. *Alaska Television Network*, 310 F. Supp. 1073 (W.D. Wash. 1969), where a telecast was recorded and the recording subsequently was replayed by a CATV system for transmission of signals to its subscribers. CBS' assertion, in reliance on that case, that Teleprompter distributed "distant signals" at times other than those when they were originally broadcast is strange indeed. The making of a recording is specifically covered by the statute as one of the copyright proprietor's exclusive rights. The recording referred to by CBS (JA 199) relates to school science programs recorded by the Farmington CATV for distribution through the system to schools and subscribers at the request of the school and *with the consent* of the educational station which originally broadcast the programs. JA 198-199; JE 340-343. No CBS programs were involved in any way in this activity.

II

CATV SUBSCRIBERS ARE MEMBERS OF THE PUBLIC FOR WHOM BROADCASTS ARE INTENDED.

Three times in its brief (Br. at 30, 33, 48) CBS has quoted what appears to be a statement of this Court in *Fortnightly* that the broadcasts received in *Fortnightly* by the CATV were intended for a "segment" of the public. In fact the quotation set out by CBS without secondary identification of source is taken from *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315, 325 (D. Idaho 1961), quoted by this Court (392 U.S. at 400 n.28) in connection with its holding that "[t]he function of CATV systems has little in common with the function of broadcasters." 392 U.S. at 400.

Intermountain does not support CBS' theory of "segment of the public." In that case a Salt Lake City broadcaster brought suit to prevent a CATV system in Twin Falls, Idaho, from receiving the broadcasts of the Salt Lake City station and from using microwave to bring the signals to Twin Falls—a distance of about 185 miles—where they were distributed to the CATV subscribers. *Intermountain* teaches that a CATV audience in Twin Falls which receives a Salt Lake City telecast via microwave is a "segment" of the public for which the broadcast was intended.

CBS' "segment" argument, like the contention in *Fortnightly* that the signals received and carried by the CATV could not be received by the public in the CATV community,[10] were answered by the holding by this Court, in the same context in which it cited *Inter-*

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[10] See *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177, 186 (S.D.N.Y. 1966).

mountain, that "CATV systems receive programs that have been released to the public and carry them by private channels to *additional viewers*". 392 U.S. at 400 (emphasis added).

III.

CBS HAS MISTAKENLY SOUGHT TO BRUSH ASIDE THE TELEVISION INDUSTRY ECONOMICS BASED UPON SIZE OF AUDIENCE INCLUDING CATV VIEWERS.

CBS (Br. at 53-61) attempts to brush aside the overwhelming evidence in the record that Teleprompter's CATV systems are within the coverage area of the television stations received and carried under the television industry's economics, by asserting that the facts are "simply incorrect" (Br. at p. 54) and that it is "irrelevant" that television stations claim the CATV viewers in their coverage area (Br. at 58, n. 58). The record establishes that in television industry economics a station's rates, the sale of programs, and the selection of stations by advertisers are based on the station's audience as measured by the rating services. That record is made up in large measure of documents from CBS' files and from statements by CBS officers, as well as of material issued by stations and their representatives claiming the CATV coverage. For a discussion of this evidence, see Petitioners' Brief at 17-21, 56-64.

To argue, as CBS does (Br. at 55), that Teleprompter CATV viewers are included in the station's coverage area by the rating bureaus only *"after"* (CBS' emphasis) the station's broadcasts are being received by the CATV system merely creates confusion. The rating services use a diary or similar means to determine which station was viewed; thus the rating always must be made after the viewing, based on the number who actually viewed the broadcast.

Understandably, CBS would like to avoid the consequences of television industry economics which turn on the size of the audience of a station, including the CATV viewers.[11] However, these economics were confirmed by the National Association of Broadcasters (NAB) in a hearing before the FCC as to proposed regulations to authorize "Pay-Cable", where a charge for programs originated on CATV might be permitted. The president of the NAB stated:

> "Commercial television is supported by advertisers, who pay networks or stations to deliver audiences for exposure to commercials, and the amount of money advertisers are willing to pay is *tied directly* to the number of viewing households the television station or network can deliver." *Statement of Vincent T. Wasilewski Before the Federal Communications Commission,* at 5, Docket No. 19554 (November 5, 1973) (emphasis added).[12]

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[11] ASCAP collects royalties from broadcasters on the basis of a percentage of the station's receipts from advertisers (JA 447-448; JE 541, 544-545), and in this fashion participates directly in increased advertisng revenue due to increased audiences. See ASCAP Br. *Amicus* at 3. Thus, ASCAP's only economic "complaint" as to CATV appears to relate to CATV reception of "public" (presumably educational) television stations. *Id.* at 21-22.

[12] Similarly, in the same proceeding the Motion Picture Association of America (MPAA), represented by counsel who were counsel for United Artists in *Fortnightly,* and who filed an *amicus* brief on behalf of MPAA here and in the court below, stated:

> "Conventional televison is, of course, an advertiser supported medium and its revenues are basically derived and determined by the number of viewers which it can deliver to the advertiser. The basic formula which is expressed in terms of 'cost-per-thousand', in effect, sells or delivers viewers to the advertiser. As a consequence, conventional television is generally dependent on programs which have the widest possible mass appeal. In this fashion it hopes to maximize its revenues by delivering the biggest possible mass of viewers." Motion Picture Association of America, Family Choice Cable—

To suggest, as CBS does (Br. at 55) that some advertisers do not want to reach the whole audience is irrelevant. The industry economics are based on audience sizes, and the advertiser who wants to reach only part of an audience (women only, or men only, or young couples, or households in a particular location) pays at the rates which are determined in industry economics by the size of the station's entire audience, including CATV viewers counted in the station's audience by the rating service.

CBS speaks throughout its brief of the fact that the Los Angeles stations are received by the Farmington CATV. By reiteration of the distances to Los Angeles and by reference to the hypothetical possibility of the reception of a New York station by a CATV system in Tokyo (Br. at 55-56) CBS tries to gives the incorrect impression that there is no relationship in any of the situations here involved between the CATV community and the television station community.[13]

The suggestion by CBS (Br. at 56) that the industry economics are not applicable because a CATV at any time could enlarge or contract the station's coverage area by receiving or ceasing to receive a station has no

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A Television Service in the Public Interest, at Point I (Mimeographed print of a presentation by the Motion Picture Association and Program Suppliers before the Federal Communications Commission, November 6, 1973).

[13] Farmington CATV viewers are clearly included in the coverage area of the Albuquerque stations despite the distance of 144 miles between the communities. JE 425, 428, 459, 460, 464-468. In addition, Farmington residents shop in Albuquerque, and the Albuquerque papers circulate in Farmington. JA 521, 526-27. Similarly, Rawlins CATV viewers are in the coverage area of the Denver stations (JE 451, 462); in addition, Rawlins residents shop in Denver and take the Denver paper. JA 546.

support in the record, and CBS cites none. The FCC rules and the control which the FCC has through microwave licenses to determine whether a CATV may receive a station and make the signals available to CATV subscribers is a full answer to the CBS groundless supposition (see also Petitioners' Brief at 50-56).

Moreover, the fact that a television station under the FCC rules has responsibilities with respect to the community in which the station is located (see CBS' Br. at 56-60) in no way changes the industry economics based on audience size. When the Commission has determined under the public-interest standards of the Communications Act what reception service a CATV can offer the public, that reception is taken into account in the industry economics. The copyright statute should not be construed to permit the copyright owner to nullify the FCC rules on the basis that it would suit the copyright owner's economic interest to be able to prevent a part of the public from receiving a broadcast intended for public reception.[14]

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[14] CBS asserts (Br. at 46 n. 44), without basis in fact, that Teleprompter has itself asserted a "proprietary interest" in programs it was "importing, carrying and distributing." The legal actions CBS cites were pertinent to a Teleprompter-owned CATV in Sault St. Marie which was faced with closing or disposition under a new Canadian rule requiring 75% Canadian ownership. The litigation involved the question whether a Presidential or Congressional approval was necessary for microwave services in connection with negotiations with a Canadian group to take over the CATV. No issue of property rights in programs was involved. See *Teleprompter Cable Services, Inc.* v. *American Microwave & Communications Corp.*, 35 F.C.C.2d 943 (1972).

IV

CBS IS SEEKING AN INTERPRETATION OF THE COPYRIGHT LAW WHICH WOULD GIVE THE COPYRIGHT PROPRIETOR THE DISCRETIONARY AUTHORITY TO DETERMINE WHAT IS "SATISFACTORY" TELEVISION SERVICE FOR MILLIONS OF CATV HOUSEHOLDS.

CBS has responded to Teleprompter's drawing attention to a CBS press release which relates to network control of program distribution [15] by arguing that CBS' intentions were "defensive" (Br. at 66). There is, CBS asserts, no " 'network' conspiracy" (*id.*), and it maintains that it will grant licenses to CATV to receive when *it* determines that "satisfactory" service is not otherwise available. But, CBS sought injunctions in this case to deny CATV reception service to the residents of Farmington, Great Falls, and Rawlins, which service is authorized under FCC rules. The expansion of the copyright monopoly afforded by the court below puts into the hands of CBS and other large copyright owners the power to determine what is "satisfactory" reception service for millions of households now relying on CATV. Thus, the copyright owners acting in their private interests would have discretion as to what television can be enjoyed by those households as well as other members of the public who in the future might wish to use CATV for television reception.

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[15] In this release (JE 470), CBS avowed its intention to use copyright to preserve "the present system of nationwide program distribution by the television networks through their affiliated stations."

V

THIS COURT IN FORTNIGHTLY DID NOT REJECT COMMUNICATIONS ACT AND ANTITRUST POLICY CONSIDERATIONS IN CONSTRUING THE COPYRIGHT ACT.

By a truncated quotation, CBS tries to give the impression that this Court in *Fortnightly* rejected the relevance of public policy considerations in construing the Copyright Act. As authority, CBS sets out an edited quote from the Court's *Fortnightly* opinion:

> "[This Court] declined to 'render a compromise decision . . . that would . . . accommodate various competing considerations of copyright, communications, and antitrust policy . . . . We take the Copyright Act of 1909 as we find it.' 392 U.S. at 401-402 [footnotes omitted]." Br. at 49.

The quote is cited out of context. The full passage indicates that it was written in reference to a license implied-in-law argument made by the Solicitor General and not to contentions made respecting the interpretation of the Copyright Act itself.

In *Fortnightly,* the Solicitor General proposed what this Court called a "compromise decision" in which CATV reception would be held to be a "performance", with a license implied-in-law for CATV reception within the Grade B contour of a station, a proposal which the Solicitor General said "would accommodate various competing considerations of copyright, communications and antitrust policy" (392 U.S. 401, n. 32). The Court declined the Solicitor General's invitation, specifically stating that it was not necessary for it to "reach the question of implied license." *Id.*

The Court's holding was that CATV reception was not a performance within the meaning of the Copyright Act. In reaching this interpretation, the Court most certainly did not reject the applicability of policy considerations embodied in the Communications Act and the antitrust laws, as CBS implies. These other acts do bear on the construction this Court should place on the Copyright Act. Cf. *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 656, 672 & n.18 (1969).

CONCLUSION

In *Fortnightly*, this Court said that it took the Copyright Act as it found it; changes are for the Congress. 392 U.S. at 401-402. Several *amicus* briefs have called attention to the fact that there is a "Consensus Agreement" arrived at by CATV, broadcasters and the copyright owners under the aegis of the FCC and the President's Office of Telecommunications Policy as to the content of new copyright legislation. CBS cites speeches by Chairman Burch of the FCC in which he was expressing the view that the appropriate resolution for the future lies in new copyright legislation, and exhorting the CATV industry to support the "Consensus Agreement" approach to new legislation. Reasons for new legislation are pertinent in a legislative context, but provide little guide to the interpretation of the Copyright Act of 1909.

The reception function of Teleprompter's CATV systems is identical to that of the *Fortnightly* systems. The reception equipment was the same as that used by the *Fortnightly* CATVs, with the addition of a microwave in lieu of cable for part of the connection to

the receiving antenna. We submit that the statement of this Court in *Fortnightly* should be dispositive:

> "With due regard to changing technology, we hold that petitioner did not under the law 'perform' the respondent's copyrighted works." 392 U.S. at 402.

The decision below on the issue presented in this petition should be reversed.

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